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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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MAXIMILIAN KLEIN, et al.,

             Plaintiffs,

     vs.

META PLATFORMS, INC.,

             Defendant.

This Document Relates To: All Consumer Actions

Consolidated Case No. 3:20-cv-08570-JD

CONSUMER PLAINTIFFS' PROFFER REGARDING EXPERT TESTIMONY

 The Hon. James Donato

REDACTED VERSION FILED PUBLICLY

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Case No. 3:20-cv-08570-JD

CONSUMER PLAINTIFFS' PROFFER REGARDING EXPERT TESTIMONY [REDACTED VERSION]

1   Consumer Plaintiffs ("Consumers") respectfully submit this proffer in response to the Court's

2 April 18, 2024 minute order regarding expert testimony. The Court's order authorized each party to

3 have two experts—"one liability expert and one damages expert"—for summary judgment and trial

4 purposes, and to make a proffer regarding any requested additional experts. Dkt. 789. Consumers

5 name antitrust economists Dr. Joseph Farrell and Dr. Nicholas Economides as their two economics

6 experts for summary judgment and trial. Dr. Farrell's and Dr. Economides' merits testimony will both

7 address certain liability topics (market definition and indirect evidence of monopoly power), but their

8 testimony will not be redundant. While they have reached the same conclusions, they have performed

9 different economic analyses to reach those conclusions. Otherwise, they will address different topics.

10 These economists' different areas of focus allow them to opine on discrete, complementary issues.

11   Consumers proffer Professor Sarah Lamdan as an additional merits expert. Professor

12 Lamdan's testimony is highly relevant to Consumers' case. Consumers allege that Facebook knew

13 consumers care about their data and online privacy and Facebook deceived the market about its data

14 abuses in order to gain and maintain monopoly power. Jurors and the Court can better assess this

15 theory aided by the specialized knowledge of Prof. Lamdan, an expert who studies privacy

16 preferences and practices in the market.

17 **I.**   **DR. JOSEPH FARRELL**

18   Dr. Farrell is an antitrust economist who serves as a Professor in the Department of Economics

19 at the University of California, Berkeley. He previously served as the chief economist at the Federal

20 Trade Commission, the Department of Justice Antitrust Division, and the Federal Communications

21 Commission. He has published extensively on the economics of competition, market definition,

22 industrial organization, and innovation, co-authored the 2010 Horizonal Merger Guidelines, and has

23 served as an expert in a variety of competition-related matters. Consumers intend to offer testimony

24 from Dr. Farrell regarding certain economic analyses of market definition and monopoly power, and

25 competitive harms that can result from deception, as well as rebuttal to Facebook's experts.

26   ***Market Definition.*** Based on economic principles and his extensive analysis of the record in

27 this case, Dr. Farrell will show that the Personal Social Network Market ("PSN Market") is a relevant

28 antitrust product market, and the United States is the relevant antitrust geographic market. Dr. Farrell

1   will offer both qualitative and quantitative analyses to support his definition of the relevant market.

2   Dr. Farrell will explain how qualitative evidence confirms that personal social networks—

3   such as apps from Facebook, Instagram, Snapchat, MeWe, and Google+—fulfill a distinct use case

4   for users, facilitating users connecting and sharing content online with their friends and family. In

5   particular, Dr. Farrell will offer his economic analysis of three strands of qualitative evidence: ████

6   ██

7   ██

8   ██

9   ██

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12 ██████████████████████████████ As Dr. Farrell will explain, Facebook's ████████

13 ██

14 ██ Similarly, Facebook's ████████

15 ██ support

16 the PSN Market by showing ██

17 ██

18 Dr. Farrell will also explain how quantitative analysis further validates the PSN Market. Dr.

19 Farrell performed a quantitative SSNIP (small but significant non-transitory increase in price) test

20 using critical loss analysis ("CLA") and upward pricing pressure ("UPP") analysis that confirmed the

21 PSN Market is, in fact, the correct way to define and view the relevant antitrust market in this case.

22 CLA and UPP analyses are well-accepted, standard tools used by economists for market definition as

23 Dr. Farrell will explain, and he has greatly contributed to the economic literature on them.[1]

24 ***Monopoly Power.*** Dr. Farrell will also show that Facebook possessed monopoly power in the

25 PSN Market during the Class Period (December 2016–2020). He will do so by using data produced

26 by Facebook and non-parties in this case to calculate Facebook and jointly-owned Instagram's market

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28 [1] *See, e.g.*, Joseph Farrell and Carl Shapiro, "Upward Pricing Pressure and Critical Loss Analysis: Response," Competition Policy International Antitrust Journal (2010).

1   share (on average, ▮▮▮), using the number of minutes that users spent on the major apps in the market

2   during the Class Period (Facebook, Instagram, Snapchat, Google+, and MeWe).

3   ***Deception-Based Competitive Harms***. Consumers' theory of anticompetitive conduct is that

4   Facebook obtained and then maintained monopoly power by deceiving the market about its data and

5   privacy practices. Dr. Farrell will testify how, as an economic matter, a firm's deception can give rise

6   to antitrust harm by distorting consumer choice, weakening competitors, and undermining the

7   competitive process. Dr. Farrell will further explain that the anticompetitive effects of deception are

8   well-recognized in the economic field; indeed, he has contributed to the literature on this very issue.[2]

9   ## II.   DR. NICHOLAS ECONOMIDES

10   Dr. Economides is an antitrust economist that serves as a Professor of Economics at the

11 Leonard N. Stern School of Business at New York University. He has published extensively on the

12 economics of industrial organization, network industries, and electronic commerce, serves as the

13 Founder and Executive Director of the Networks, Electronic Commerce and Telecommunications

14 Institute, and has been qualified as an expert economist in a number of matters. Consumers intend to

15 offer testimony from Dr. Economides regarding certain economic analyses of market definition and

16 monopoly power, antitrust impact, and damages, as well as rebuttal to Facebook's experts.

17   Although Dr. Economides and Dr. Farrell have reached the same conclusion regarding market

18 definition and monopoly power (issues Facebook hotly contests, and on which Facebook offers

19 multiple experts)—they have performed different economic analyses, based on different strands of

20 evidence, and using different data sets, to reach those conclusions. Their different areas of focus

21 within the broad field of economics makes their analyses here complementary, not duplicative.

22   ***Market Definition.*** Using non-duplicative analyses, Dr. Economides will explain why the

23 PSN Market is well-defined and it and the United States are the correct relevant product and

24 geographic markets in this case. He will do so by analyzing the product characteristics of Facebook

25 and other online services (and how they are, or are not, interchangeable for a particular use from

26 consumers' standpoint), as well as business documents, testimony, and submissions to antitrust

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28 [2] *E.g.* Joseph Farrell et al., "Standard Setting, Patents, and Hold-Up," 73 Antitrust Law Journal, no. 3 (2007): 609. 657 ("deceiving buyers . . . subverts the competitive process," is "antithetical to antitrust policy," and "typically enriches the deceptive party at the expense of others").

-3-   Case No. 3:20-cv-08570-JD

1 authorities from Facebook, industry participants, and their executives. Dr. Economides will further

2 explain how this well-accepted approach is standard for economists,[3] and confirms the PSN Market

3 is a valid relevant market and why other types of services like niche networking services (*e.g.*,

4 LinkedIn and Nextdoor), messaging services (*e.g.*, iMessage and WhatsApp), and public content

5 services (*e.g.*, YouTube, TikTok, Twitter, Reddit, and Pinterest) are properly excluded from that market.

6   Dr. Economides will also demonstrate how using a real-world event—Apple's introduction

7 of its App Tracking Transparency ("ATT") feature—quantitatively confirms that the PSN Market is

8 the relevant market in this case through a variant of the well-accepted SSNIP test. More specifically,

9 Dr. Economides will show that by limiting the ability of apps like Facebook to track users and collect

10 their data, ATT led to a decrease in the effective price of those services (*i.e.*, data collection and use),

11 disproportionately impacting the revenues of Facebook, jointly-owned Instagram, and Snapchat

12 (which comprise the bulk of the PSN Market) compared to non-PSN services. This shows the

13 effective price decrease to a more competitive level was unprofitable, so, in reverse, an effective price

14 increase from a more competitive level was profitable, thereby showing the PSN Market is a relevant

15 market under the SSNIP test. Dr. Economides will further explain how reverse-SSNIP analyses are

16 accepted by economists in the field.[4]

17   ***Monopoly Power***. Dr. Economides will also show direct evidence of Facebook's monopoly

18 power. Facebook has long maintained supracompetitive profits far exceeding other firms', and it has

19 been able to ***worsen*** terms—such as by offering inferior data and privacy practices—without

20 adversely impacting its bottom line. Dr. Economides' analysis is non-duplicative, as Dr. Farrell does

21 not analyze direct evidence of Facebook's monopoly power. Using data from Comscore (a different

22 data set than the one Dr. Farrell used), Dr. Economides will also establish indirect evidence of

23 Facebook's monopoly power by calculating it and jointly-owned Instagram's market share in the PSN

24 Market based on two metrics: time spent (at least ███) and monthly active users (at least ███).

25   ***Antitrust Impact***. Dr. Economides will show that Facebook's anticompetitive deception

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27 [3] *See, e.g.*, Jonathan Baker, "Market Definition: An Analytical Overview," 74 Antitrust Law Journal (2007): 139–41.

28 [4] *See, e.g.*, Paul de Bijl et al., Interconnected Networks, Tilburg University (TILEC Paper), Feb. 2005, at p. 52 (describing "reverse SSNIP" test).

1   harmed each Consumer Class member. He will explain that while Facebook charges users a monetary

2   price of $0 as a monopolist in the actual world, it is not "free": Facebook simply transacts with users

3   via currency in-kind (*i.e.*, the collection and use of their data). Dr. Economides will demonstrate that

4   where, as here, the starting price is "zero" (*i.e.*, Facebook offers users $0 for their data, an effective

5   overcharge), increased competition would have led to Facebook compensating users for their data,

6   had it not prevented that increased competition through its anticompetitive deception. Class members

7   are harmed because Facebook's ill-gotten, monopoly power in the actual world allowed it to deprive

8   Class members of these better price and quality terms. And that harm is class-wide, because Facebook

9   does not and cannot individually negotiate user-by-user with hundreds of millions of users, so it would

10 have had to uniformly offer these better terms to all Class members.

11   ***Damages***. Dr. Economides will also quantify the harm to Consumer Class members flowing

12 from Facebook's anticompetitive deception. He will offer a damages model based on the yardstick

13 method, which economists regularly use in antitrust cases like this one.[5] Using prices other services

14 that compensate users for their data actually pay, Dr. Economides will identify the likely competitive

15 compensation that Facebook would have provided Class members for their data in the but-for world:

16 $5 per month, with $3.50 or $6.25 as alternatives. Dr. Economides' model uses as yardsticks data

17 compensation services from Comscore, Nielsen, Google, Amazon, Luth Research, Verto Analytics,

18 Strategy Analytics, Embee Mobile, SmartPhoneMate, and Facebook itself, and he will explain why

19 his yardsticks are appropriate comparators and supported by the record in this case.

20 **III.   PROFESSOR SARAH LAMDAN**

21   Professor Sarah Lamdan is Consumers' requested additional expert. Professor Lamdan is a

22 Professor of Law at the City University of New York School of Law with deep expertise in data

23 privacy, information management, and how data analytics companies use consumers' data for

24 targeted advertising and other purposes. Professor Lamdan has published academic papers on privacy

25 law, studied consumers' data privacy preferences, worked with privacy advocacy organizations, and

26 testified before Congress about the privacy implications from federal agencies' use of data analytics

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28 [5] *See, e.g.*, McCrary, Justin and Daniel L. Rubinfeld. "Measuring Benchmark Damages in Antitrust Litigation," Journal of Econometric Methods, Vol. 3, No. 1 (2014): 63.

CONSUMER PLAINTIFFS' PROFFER REGARDING EXPERT TESTIMONY [REDACTED VERSION]

1 firms (*e.g*., Thomson Reuters and LexisNexis).

2   Professor Lamdan's testimony would provide the Court and jury a view of issues highly

3 relevant to this case and based on specialized knowledge. Consumers allege that Facebook users care

4 about their data and online privacy, and that Facebook deceived the market about its data and privacy

5 practices to achieve and maintain its monopoly power. This Court and jurors may know they care

6 about their data and privacy. But Facebook apparently intends to contest this issue, and Prof. Lamdan

7 provides a basis for qualitatively and quantitatively establishing that consumers and the market do in

8 fact care about these issues greatly. Professor Lamdan's deep research on these topics will provide

9 valuable tools to both the Court and jurors in assessing these factual issues.

10   Professor Lamdan's expertise is also crucial to offsetting the information asymmetry that

11 exists between Facebook and the public. The ways in which Facebook collects and uses Class

12 members' data is opaque (by design), and Facebook has long benefited from and exploited this

13 imbalance. Professor Lamdan has spent years researching the data and privacy practices of public and

14 private entities, putting her in a unique position to explain the data that Facebook actually collects

15 and the uses to which that data is put (notwithstanding Facebook's contrary representations and

16 omissions). She will further explain how data analytics companies like Facebook cause and exploit

17 consumers' lack of understanding over the ways their data is collected and used. Given the technical

18 nature of these issues and the well-documented lack of understanding over Facebook's actual privacy

19 and data practices, having an expert with exceptional experience studying how large database-like

20 systems collect, use, track, store, and share user data will be useful to the jury and the Court.

21   Professor Lamdan's unique expertise will also aid the jury in understanding other non-lay

22 concepts highly relevant to Consumers' case and Facebook's defenses. One example is the so-called

23 "privacy paradox." Facebook's defenses embrace this "paradox," which posits that users

24 paradoxically claim in surveys to value their data and privacy, but supposedly act inconsistently (such

25 as by toggling their privacy settings in ways that are not the most restrictive or privacy-protecting).

26 Professor Lamdan will explain why this paradox (and its predicates) has been disproven in academic

27 literature and by the record. Professor Lamdan will also rebut Facebook's multiple experts who opine

28 on the same or related topics, such as whether Facebook's data practices are best in class or not.

CONSUMER PLAINTIFFS' PROFFER REGARDING EXPERT TESTIMONY [REDACTED VERSION]

1 Professor Lamdan's testimony would not be redundant. Given her study of privacy beliefs and

2 practices in the market and her deep experience examining data collection, use, and surveillance tools,

3 Professor Lamdan offers a different perspective based on a different type of specialized knowledge

4 from Consumers' economics experts.

5 Consumers respectfully request the Court accept their proffer of Professor Sarah Lamdan as

6 Consumers' privacy expert.

7 DATED: August 9, 2024

8 By: */s/ Shana E. Scarlett*   By: */s/ Kevin Y. Teruya*

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CONSUMER PLAINTIFFS' PROFFER REGARDING EXPERT TESTIMONY [REDACTED VERSION]

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ATTESTATION OF KEVIN Y. TERUYA

2   This document is being filed through the Electronic Case Filing (ECF) system by attorney

3 Kevin Y. Teruya. By his signature, Mr. Teruya attests that he has obtained concurrence in the filing

4 of this document from each of the attorneys identified on the caption page and in the above signature

5 block.

6

Dated: August 9, 2024   By   */s/ Kevin Y. Teruya*

7   Kevin Y. Teruya

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CERTIFICATE OF SERVICE

10   I hereby certify that on this 9th day of August 2024, I electronically transmitted the foregoing

11 document to the Clerk's Office using the CM/ECF System, causing it to be electronically served on

12 all attorneys of record.

13

By   */s/ Kevin Y. Teruya*

14   Kevin Y. Teruya

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CONSUMER PLAINTIFFS' PROFFER REGARDING EXPERT TESTIMONY [REDACTED VERSION]